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Naomi Roht-Arriaza

UC Hastings College of the Law, rohtarri@uchastings.edu

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Recommended Citation

Naomi Roht-Arriaza, *Universal Jurisdiction: Steps Forward, Steps Back*, 17 *Leiden J. Int'l L.* 375 (2004).

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Author: Naomi Roht-Arriaza

Source: Leiden Journal of International Law

Citation: 17 LEIDEN J. INT'L L. 375 (2004).

Title: *Universal Jurisdiction: Steps Forward, Steps Back*

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Universal Jurisdiction: Steps Forward, Steps Back

NAOMI ROHT-ARRIAZA*

Abstract

The arrest of the Chilean general Augusto Pinochet Ugarte in London in 1998, and decisions in UK, Spanish, Belgian, and other European courts supporting his extradition, opened new hope that prosecutions of international crimes in national courts under universal jurisdiction laws might prove a viable strategy for combating impunity. Complainants brought cases in a number of European countries, most notably Spain and Belgium. In Spain, the Supreme Court eventually cut back on the reach of the universal jurisdiction law by superimposing the requirement of a nationality tie to the forum, as well as modifying other prior jurisprudence. In Belgium, the courts grappled with issues of immunity and the ability to initiate proceedings in the absence of the defendant. Under US pressure the Belgian legislature eventually narrowed and weakened the law. The article traces these developments, and concludes that advocates need to be more strategic in choosing both the number and type of cases they present under theories of extraterritorial jurisdiction. The primary criterion, the author argues, should be the potential for the extraterritorial case to catalyze anti-impunity efforts in the territorial state.

Key words

Belgium; international crimes; international law in national courts; Spain; universal jurisdiction

The arrest of the Chilean general Augusto Pinochet Ugarte in London in 1998, and rulings supporting his extradition to Spain on torture charges by the British House of Lords and the Spanish Audiencia Nacional, kindled new hopes in victims' associations and human rights advocates around the world. The 2001 jury trial and conviction in Belgium of four Rwandans for their roles in the 1994 Rwandan genocide showed that the courts of third-party states could bring to a successful conclusion investigations into crimes against humanity committed half a world away. With these precedents, advocates filed an increasing number of requests for new transnational investigations. After all, formal amnesty laws or informal threats, bribes, or other obstacles closed the courts of many countries to criminal investigations or civil lawsuits involving abuses by local military or political leaders. The *Pinochet* and Rwandan/Belgian precedents showed that transnational prosecutions could be a viable alternative, and fired imaginations around the world.

Cases began to arrive before the Spanish and Belgian courts, because their laws allowing extraterritorial jurisdiction are the best known, and their procedural rules allow victims a large degree of initiative in filing and pursuing a criminal case. The most promising cases before the Spanish courts involved Guatemala and Peru.

* Professor of Law, University of California, Hastings College of the Law.

Belgian cases initially involved Africans, among them Yerodia Ndombasi and other officials of the government of Laurent Kabila in the Democratic Republic of Congo, and Hissène Habré, the former dictator of Chad. Other courts also received transnational cases alleging torture, summary execution, and/or crimes against humanity. The Dutch courts opened an investigation into Surinamese military head Desiré Bouterse,¹ the Senegalese looked into Habré's crimes,² and the French courts moved against officials from Mauritania and Congo (Brazzaville).³

Each of these cases, in its own way, came up against the political and legal difficulties involved in transnational prosecutions, especially those against still-powerful suspects. A string of judicial and legislative decisions has narrowed the permissible scope of such prosecutions in Spain, Belgium, and the Netherlands. By 2003, these developments marked at least a temporary retreat from the optimism of even a few years earlier.

Recent jurisprudence and legislation on universal jurisdiction brings to the fore a number of key issues in making transnational prosecutions under universal jurisdiction a useful tool. These include the strength of the ties required between the subject matter of the case and the forum state, the relationship between the ability of the territorial state to hear the case and that of the forum state to proceed, the need for the defendant to be present in the forum state for an investigation to be begun or indictments issued, and the balance between the courts and the executive branch in allowing a case to proceed. This article will focus on the Spanish and Belgian cases, because the laws of those countries have been both the most widely used and the most controversial. In Spain, developments have been limited to the courts, while in Belgium court decisions were followed by legislative reform. In both cases, the response to perceived theoretical problems of overlap and potential conflicts with sovereignty was coloured by political pressure. In both cases, the response piled overlapping restrictions on top of each other, hobbling but not killing the laws.

I. THE SPANISH COURTS AND UNIVERSAL JURISDICTION: JUDICIAL EXPANSION AND CONTRACTION

Spain's law on universal jurisdiction was used in the 1980s and early 1990s against narcotics smugglers and other common criminals, but was first used in the context of mass violence in the 1996 cases against Argentine and Chilean military officers and civilians involved in those countries' respective military dictatorships. Article 23.4 of the Organic Law of Judicial Power allows for the prosecution of certain

1. *Bouterse Case*, Supreme Court of the Netherlands, Criminal Div., No. 00749/01 (CW 2323), Judgment of 18 Sept. 2001. For commentary, see J. K. Kleffner, 'Jurisdiction over Genocide, Crimes Against Humanity, War Crimes, Torture and Terrorism in the Netherlands', in A. Cassese and M. Delmas-Marty (eds.), *Crimes internationaux et juridictions nationales, étude comparée* (2002).
2. *Souleymane Guengueng et autres contre Hissène Habré*, Cour de Cassation du Senegal, Première chambre statuant en matière pénale, Arrêt n° 14 du 20-3-2001 Pénal, 20 March 2001, available at http://www.hrw.org/french/themes/habre-cour_de_cass.html.
3. *FIDH v. Ould Dah*, Cour d'Appel de Montpellier, 25 May 2001; *Case of Certain Criminal Proceedings in France (Republic of the Congo v. France)*, application of 9 Dec. 2002, available at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iapplication_20020209.pdf; Order of 17 June 2003, Request for Provisional Measures, available at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.PDF.

crimes committed by non-Spaniards outside Spain, including genocide, terrorism, and other crimes recognized in international treaties ratified by the Spanish government. Article 23.4 was incorporated into Spanish criminal law in 1985, but an earlier version went back to the 1880s. Thus, while both the complaint and the decision accepting it used international law liberally in justifying the court's ability to exercise its power, the case was firmly grounded in Spanish national law.

Despite the predominance of Spanish victims in the initial complaints, the cases were not legally based on the nationality of the victims. Spanish law did not provide for such passive personality jurisdiction. Rather, the early emphasis on Spanish victims stemmed from general legal and political considerations. Legally, the Spanish constitution requires judges to do justice on behalf of Spanish citizens, which might make an investigating judge more likely to take on what would be likely to be an unconventional, difficult, and time-consuming case. Moreover, a judge who needed to explain to colleagues or appeals courts why Spain had any business getting involved in far-off, long-ago events would have an easier time of it if he could point to Spanish victims as well as relying on any more abstract legal principle. Conversely, the political branches of government would find it more difficult to explain why Spanish courts should not be getting involved when Spanish citizens had been harmed.

Spain also had a number of procedural advantages. Not only can a victim bring a complaint directly to an investigating magistrate and ask for it to be pursued, but the victim then becomes a party to the case and is able to follow the course of the investigation and any subsequent trial. Even if the public prosecutor disagrees, if the victim can convince the investigating magistrate that there is a valid case, investigation can proceed. Plaintiffs can pursue civil damages in the course of the proceedings, and rarely bring a separate civil case where criminal behaviour is at issue. Even more expansively, Spain has very broad rules allowing people who are not directly connected to an alleged crime to file complaints. These 'popular accusers' have to be reputable non-governmental groups concerned with the public interest. They can file complaints, become party to cases, and even have privileged access to the files and the ability to intervene at many stages of the proceedings.

Two investigating magistrates accepted the complaints against Argentine and Chilean suspects, and the public prosecutor (representing the Spanish state) challenged the Spanish courts' jurisdiction over the matters. The Audiencia Nacional (AN – National Court), acting as a national appeals court, heard the jurisdictional challenges. In November 1998, the court found that Spain could properly hear the cases under Spain's universal jurisdiction law.⁴ It upheld the genocide charges on the grounds that the Genocide Convention, while it does not explicitly provide for universal jurisdiction (only territorial and that of an international criminal court), does not prohibit it.⁵ However, in a line of argument that was to prove problematic later, the AN added that Article 6 of the Convention makes any non-listed kind of

4. *Chilean Genocide Case*, Audiencia Nacional, 5 Nov. 1998, reproduced in English in R. Brody and M. Ratner (eds.), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000), 95. Both that case and the companion Argentine case, dated 4 Nov. 1998, may be found in Spanish at <http://www.derechos.org/nizkor/arg>.

5. 1948 Convention on the Prevention and Punishment of the Crime of Genocide, entered into force 12 Jan. 1951, 78 UNTS 277. Article 6 states: 'Persons charged with genocide or any of the other acts enumerated in Article III

jurisdiction secondary to those that are listed, so that, for instance, if a court in the country where the crimes occurred were hearing the same case the forum state court would have to defer. The AN found that the fact that the jurisdiction law dated from 1985 (i.e. after the alleged crimes took place) was not a bar to prosecution, since it was procedural, not substantive, and thus applied as of the time of filing the case. The definition of the substantive offences clearly pre-dated the conduct at issue, and so raised no *ex post facto* law problems. The AN also allowed the terrorism and torture charges to go forward, and held that domestic amnesties in both Chile and Argentina did not preclude a Spanish court hearing the case.

The AN's decision allowed the attempted Spanish extradition of Augusto Pinochet to go forward in the United Kingdom, although this was eventually denied due to Pinochet's ill-health and he returned home to Chile.⁶ It also permitted an indictment against Adolfo Scilingo, an Argentine naval officer accused of participating in 'death flights' while working in the infamous Naval Mechanics School (ESMA), arrested when he travelled to Spain. A similar indictment against Ricardo Cavallo, another ESMA operative accused of torture, became the basis of an extradition request to Mexico, where Cavallo was arrested. In June 2003, he was extradited to Spain.⁷ Both are now awaiting trial.

The decision also prompted a number of other complaints under the universal jurisdiction provisions of Spanish law. Complaints against sitting heads of state were quickly dismissed on immunity grounds; cases involving Guatemala and Peru, however, seemed promising.

The first involved the massacre of Mayan peasants and others in Guatemala during the 1970s and 1980s. In December 1999, Nobel Peace Laureate Rigoberta Menchú, together with groups of family members of the Guatemalan dead, Spanish labour unions, and solidarity groups, filed a complaint charging eight people with genocide, terrorism, and torture. The suspects included five generals and a colonel, among them former presidents, defence and interior ministers, and heads of the police. The most notorious was General Efraín Ríos Montt, who had taken power in a coup in March 1982 and over the next 18 months proceeded to wipe out hundreds of Mayan villages. Ríos Montt continued to dominate Guatemalan politics, as President of Congress (and a losing presidential candidate in November 2003 elections). The complaint included a number of unrelated incidents, including the death of Menchú's own family, the killing or disappearance of four Spanish priests, and a series of rural massacres and urban disappearance cases.

shall be tried by a competent tribunal of the State in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' The court approved the characterization of the acts as genocide against a national group, on grounds that the victims had been targeted because of their group membership – a group perceived as opposed to the national project of the military – which satisfied the intent of the convention. The court also pointed out that, during the relevant time, Spain included 'social group' within the definition of the groups covered by its genocide law.

6. On his return to Chile, Pinochet was indicted on disappearance and murder charges, and his immunity was stripped by the courts in 2000. He was eventually found mentally unfit to stand trial.

7. *Extradición Ricardo Miguel Cavallo*, Mexican Supreme Court of Justice of the Nation, Amparo en Revisión 140/2002, 10 junio 2003, available at [http://www.scjn.gob.mx/Asuntos/2003/Cavalloengrose\(x\)2.pdf](http://www.scjn.gob.mx/Asuntos/2003/Cavalloengrose(x)2.pdf). The case is reproduced in English at (2003) 42 ILM 884.

On 27 March 2000 Judge Guillermo Ruíz Polanco accepted the complaint and agreed to open an investigation. In his ruling the judge noted the connections to Spain, and found that the accused each had direct responsibility for the crimes charged.⁸ The judge, like Judge Baltasar Garzón in the Argentine cases, found that Spanish jurisdiction was appropriate because the territorial courts had not acted. While Guatemala had 'original territorial jurisdiction', it was not exclusive. 'In the absence of the honourable and effective exercise of jurisdiction it must be replaced by courts – such as Spain's – that uphold the universal prosecution of crimes against human rights', the judge wrote.

The Guatemalan complaint had a number of strengths. The magnitude of the massacres was undeniable, and a UN-sponsored commission had already characterized the crimes as acts of genocide.⁹ The underlying acts at least in part concerned Spain. On the other hand, far less was known in Spain about the Guatemalan case than about Chile or Argentina, and Ríos Montt had never gained the iconic status of a Pinochet. In addition, unlike the Chilean 1978 amnesty law or the due obedience and *punto final* laws in Argentina, the 1996 amnesty law in Guatemala excluded cases of genocide, torture, and disappearances.¹⁰ Impunity there was a matter of intimidation of witnesses and judges, threats, and corruption: *de facto*, not *de jure*. This made it more difficult to argue that the crimes could not be adequately investigated in Guatemala.

As he had in the Argentine and Chilean cases, the public prosecutor appealed against the grant of jurisdiction. Just before Christmas 2000, the Audiencia Nacional, sitting as a whole, decided that 'at this moment' the Spanish courts had no jurisdiction over the alleged crimes, and that the case should be closed.¹¹ The judges gave two reasons: first, while the Spanish courts could consider crimes of genocide and terrorism that were committed elsewhere by non-Spaniards, there were limits. If the Genocide Convention's text had any meaning at all, it had to mean that any non-enumerated jurisdiction was *subsidiary* to the enumerated territorial and international jurisdictions. The court drew the subsidiarity criterion from the text of the treaty, and as derived from a concern for order in the international system: Spanish law on its face imposed no such subsidiarity or exhaustion of domestic remedies requirement. It merely required a defendant not to have been acquitted, pardoned, or convicted in proceedings abroad.

The AN recognized that, as investigating magistrate Ruíz Polanco found in the Guatemalan case, at times the territorial courts did not provide an adequate forum. There were two ways, they explained, in which the domestic courts could be inactive: either there could be a legal impediment to prosecution, such as an amnesty law,

8. Judge Ruíz Polanco, Spanish Audiencia Nacional, decision of 27 March 2000. The basic documents to 2000 are contained in Fundación Rigoberta Menchú Tum, *Jurisdicción Universal para el Juzgamiento del Genocidio en Guatemala* (2001).

9. Commission on Historical Clarification, Memory of Silence, English summary available at <http://hrdata.aaas.org/ceh/report/english>.

10. Law of National Reconciliation, Decree 145-96, 18 Dec. 1996, available at <http://\\minugua.guate.net/ACUERDOSDEPAZ/ACUERDOSESPA%DIOL/LEY9620RECONCILIATION.htm>.

11. *Guatemala Genocide Case*, Audiencia Nacional decision of 13 Dec. 2000, available at <http://www.icrc.org/ihl-nat.nsf> and <http://www.derechos.org/nizkor/guatemala>.

or judges could be 'subject to pressure from official or de facto powers that create a climate of intimidation or fear making it impossible to carry out the judicial function with the serenity and impartiality required'. In the Guatemalan case, the National Reconciliation (amnesty) law created no legal impediment to the prosecution of genocide. As for de facto impediments, the court found that peace had only recently come to Guatemala – with the publication of the Truth Commission's report – and that there was nothing in the record to suggest that in the new postwar period judges would be intimidated into rejecting the Guatemalans' complaints were they to be lodged at home. In the Argentine and Chilean cases, the passage of time had made judicial inaction clear, but here it was too soon to tell. Therefore, 'for the moment', the Spanish courts should stay out of the case.

It was easy to conclude that the AN was uninterested in broadening the Spanish forum beyond the Southern Cone cases. The Spanish Supreme Court was widely considered to be more conservative than the AN, and an appeal risked losing not just the Guatemalan case, but the earlier cases as well. What is more, the AN had left the door open to the complainants to provide more evidence that the local courts could not, or would not, hear the cases, and to move to reopen before the Spanish investigating magistrate. Nonetheless, the complainants' lawyers were anxious to push the law forward. They appealed.

On 25 February 2003, more than two years after the AN decision, the Spanish Supreme Court, by a vote of eight to seven, overturned in part the lower court decision and restricted Spain's universal jurisdiction law.¹² The court allowed the complainants a small victory: it reopened those cases, such as the Spanish embassy massacre and the deaths of the Spanish priests, where there was a clear tie to Spain. But the victory came at a high price. The court held that only cases with such a tie, for example the nationality of the victim or the presence of the offender, could proceed. Moreover, the tie had to be present in the principal charges against the defendant, not just in related or ancillary ones. For that reason, all the genocide and terrorism charges were invalid, since there had been no genocide aimed at Spanish citizens per se. Only the torture charges, to the extent that they involved Spanish citizens, could stand, because the Convention Against Torture allows for passive personality jurisdiction.

For the majority, Spanish law had to conform to other principles of international law, including respect for other states' sovereignty and the principle of non-intervention in the internal affairs of other states. Extraterritorial jurisdiction, when not authorized by the United Nations or specifically regulated by treaty, required a point of contact with national interests to create legitimacy and rationality in international relations. The majority found that point of contact, given by nationality or presence, to be a jurisdictional prerequisite.

The seven dissenters found the majority's approach too restrictive and, therefore, incompatible with the treatment of genocide as a grave crime under internal and

12. *Guatemala Genocide Case*, Judgement, Supreme Court of Spain, 25 Feb. 2003, available in English at (2003) 42 ILM 683, and in Spanish at <http://www.derechos.org/nizkor/guate>. The holding of the case was reaffirmed by the decision of the Supreme Court of 8 March 2004 in the case of Chilean general Hernán Brady.

international law. The majority decision, they argued, ignored the legislative intent and the language of the Organic Law of Judicial Power section 23.4, as well as international law. It confused passive personality and universal jurisdiction, left any extraterritorial prosecution of genocide practically impossible, misconstrued the statute to confuse its treaty-based section (g) with the more general provisions on genocide, terrorism, and other crimes, and converted the minimum requirements of treaties into a maximum.

The dissent answered the majority's concern about the potential chaos in the international system posed by concurrent jurisdictions by superimposing a necessity criterion. If the domestic courts were doing their job, there was no need for extraterritorial intervention. That decision, however, could not be based on a judgement about the court's inactivity, which was too hard to measure and too politically charged at an early stage in the proceedings. Rather, any limits had to come from a flexible, prudent rule of reason aimed merely at practical concerns such as the effectiveness of an investigation and extradition request, discouraging a proliferation of unrelated claims, or a heavy burden on the Spanish courts. For the dissenters, a tie to Spain was merely an aid in applying this rule of reason, not a jurisdictional prerequisite. In this case, historic, social, linguistic, and jurisprudential ties linked Spain and Guatemala. The crimes at issue involved Spanish citizens, not as victims of genocide but as victims targeted because they defended others from genocide. There would never be a more compelling case. 'If there is no nexus in this case, then a nexus requirement becomes a mere pretext to exclude or suppress universal jurisdiction in all genocide cases', the dissenters wrote.

The plenary Supreme Court's decision revolved around the appropriate ties between the forum state and the subject matter of the case. In an attempt to avoid becoming a forum for too many unrelated cases, and to sort out what it saw as a potential source of confusion, the Court drew a very tight nexus requirement. Subsequent cases have taken care to establish the nexus with Spain. For example, when Judge Garzón indicted Osama bin Laden and 34 others on charges of terrorist activities connected to the al Qaeda network, he established Spain's jurisdiction because Spain served as a place or base for resting, preparation, indoctrinating, support, and financing of the 11 September 2001 attacks on the United States.¹³

On 8 March 2004 a panel of the Spanish Supreme Court reaffirmed its *Guatemala* holding in a case involving Chilean general Hernán Brady.¹⁴ The repetition means that its limited view of universal jurisdiction now has jurisprudential value,¹⁵ and will most likely be followed when the Court considers challenges to Spanish jurisdiction in the pending trials of Argentine torturers Adolfo Scilingo and Ricardo

13. See, e.g., 'Osama bin Laden Indicted in Spain in 9-11 Attacks', Associated Press, 18 Sept. 2003.

14. Fallo del Tribunal Supremo en el caso del Gral. chileno Hernán J. Brady Roche. Recurso de Casación no. 1812/2002, 8 March 2004.

15. Article 1(6) of the Civil Code holds that jurisprudence in the form of court decisions complements doctrine when the Supreme Court has established it 'repeatedly'.

Cavallo.¹⁶ That result would allow trial to proceed, since there were numerous victims of Spanish descent killed or disappeared in the Naval Mechanics School (ESMA), where the two men worked.

In a subsequent case involving Peru, a panel of the same court returned to the related 'subsidiarity' issue. Motivated by the same concerns, that strand of law also focuses on the appropriateness of third-state intervention, but this time asking whether there is a need for a transnational court to act based on inactivity or closing of the territorial forum rather than on links to the forum state. On 20 May 2003, a three-judge panel of the Spanish Supreme Court affirmed the dismissal of a case alleging genocide, terrorism, torture, and arbitrary detention against former presidents Alan García and Alberto Fujimori, ex-General Montecinos and other high-ranking government officials in Peru.¹⁷ The Peruvian complaint, like the Guatemalan, was based on the universal jurisdiction provisions of Spanish law, and argued that the Peruvian courts were not investigating the crimes. The panel's decision backtracked slightly from the harshness of the majority's ruling in the *Guatemala* case. It reaffirmed the Spanish courts' ability to judge genocide cases based on universal jurisdiction, reaffirmed the AN's rulings in the Argentine and Chilean cases, and left intact the possibility of trial in the pending cases of Argentine torturers.

The panel focused on the argument that the Spanish courts were 'subsidiary' to the territorial courts or an international criminal court. In the Guatemalan case, the majority had criticized the lower court's two-pronged (formal amnesty or fear and intimidation) 'subsidiarity' argument. The Supreme Court had earlier found in the *Guatemala* case that judicial inquiry into the actual availability of an alternative forum was inappropriate, because it 'implies a judgement of one state's courts about the ability to administer justice of the similarly situated organs of another sovereign state'.¹⁸ This might be appropriate for the International Criminal Court (ICC), but not a national court. The dissent agreed on this point, finding that both the Genocide Convention and Spanish law allow concurrent, not subsidiary jurisdiction, so long as the suspect has not been convicted, acquitted, or pardoned elsewhere.

The panel in the *Peru* case characterized the issue as one not of subsidiarity but of the 'principle of necessity of jurisdictional intervention',¹⁹ along the lines of the dissent in the *Guatemala* case. In other words, the possibility of universal jurisdiction permitted, although not specified, in the Genocide Convention, entails a need to prioritize among states that could simultaneously have jurisdiction over the same events. In doing so, the Court looked to whether the territorial courts are exercising *effective* jurisdiction. To evaluate effectiveness, the courts should simply look at whether the events at issue were *in fact* the subject of prosecution, without attempting to analyze the reasons or to evaluate the existence of a state of de facto

16. Ricardo Cavallo was extradited from Mexico and ordered to be detained pending trial by the AN on 29 June 2003. Adolfo Scilingo was arrested in Madrid, and his case was ordered ready for trial on 27 June 2003. Both men have appealed to the Supreme Court.

17. *Peruvian Genocide Case*, Supreme Court of Spain, Penal Chamber, 20 May 2003, available at <http://www.universaljurisdiction.info/index/128118>.

18. *Guatemala case*, *supra* note 12.

19. *Peruvian Genocide Case*, *supra* note 14.

impunity. This is a far more workable rule – perhaps the only rule that avoids having a court evaluate the efficacy of its counterparts in another country. In the Peruvian case, investigations against several of the defendants were proceeding in local courts, and suspects were in jail or had fled the jurisdiction (the case with former President Fujimori). Thus, for the time being, Spanish prosecution was inappropriate.

The Spanish Supreme Court thus avoided the complications of passing judgement on the functionality of another state's legal system, choosing what seemed to it a workable bright-line rule. However, it also left intact the underlying problem: judging *de facto* impunity. In many cases territorial courts can have investigations open for years that go nowhere because of lack of resources or political will, or due to corruption or the intimidation of lawyers, witnesses, and judges. It is unclear at what point the passage of time will lead to a finding that no *effective* jurisdiction exists. If genocide is difficult to prosecute in a domestic court precisely because of the ability of powerful defendants to subvert local judicial processes, it would seem the Spanish solution could in some cases favour impunity in the interests of a clear, bright-line rule.

2. BELGIUM: JUDICIAL ADVANCE, LEGISLATIVE RETREAT

A 1993 law gave Belgian courts jurisdiction over 20 specific war crimes (grave breaches of the 1949 Geneva Conventions and their Protocols), no matter where committed or by whom.²⁰ The Belgian courts' universal jurisdiction could be triggered by a victim acting as complainant, and it did not require the defendant's presence in Belgium to open an investigation. Immunity was also not a problem, since the Belgian law clearly stated that no immunities to investigation applied in cases involving war crimes. The law was passed with little debate, as a way of belatedly making Belgium's acceptance of the conventions meaningful in a domestic criminal context. A year later, almost a million people were slaughtered in Rwanda. Belgium investigated and convicted four Rwandans resident in Belgium for crimes committed during the course of the 1994 genocide.²¹ The Belgian courts also investigated, and requested the extradition of, Augusto Pinochet once he was detained in London.²² Lingering guilt over Belgium's role in Rwanda's tortured history, added to the desire to bring local law into compliance with the impending International Criminal Court, led to a 1999 expansion of the law, also without controversy, to cover crimes against humanity and genocide.²³

In the wake of the *Pinochet* and Rwandan cases, new complaints arrived. A group of Chadian former detainees, some resident in Belgium, brought a complaint against

20. Loi du 16 juin 1993 relative à la repression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, Additionnels à ces Conventions, *Moniteur belge*, 5 Aug. 1993.

21. *Public Prosecutor v. Alphonse Higaniro et al.*, Assize Court of Brussels, 8 June 2001. For a summary, see <http://www.asil.org/insights/insigh72.htm>.

22. Tribunal of First Instance of Brussels (J. Vandermeersch), Order of 6 Nov. 1998, reproduced in (1999) *Revue de Droit Pénal et de Criminologie* 278.

23. Law Concerning the Punishment of Grave Violations of International Humanitarian Law, (1999) 38 ILM 918.

Hissène Habré, the former president. From 1982 to 1990 Habré had periodically targeted various ethnic groups, ordered the killing of political prisoners, and had run a political police force accused of torture and murder. A subsequent Truth Commission accused him of committing crimes against humanity, although it was unable to investigate fully. A Chadian Association of Victims of Political Repression and Crime had compiled dossiers on 792 cases, but had been unable to advance domestic prosecutions. Habré fled in 1990 to Senegal. Senegal initially opened an investigation, but, under heavy political pressure, an appeals court dismissed the case in July 2000. The court, its ruling affirmed by the Cour de Cassation (the highest court), held that the jurisdictional provisions of the Convention Against Torture could not be applied to pre-ratification conduct and that customary international law could not alone serve as the basis of a criminal complaint.²⁴ With that, the complainants turned to Belgium. Belgian investigating magistrate Daniel Fransen travelled to Chad in 2002 to interview witnesses and collect documents. Eventually, with domestic complaints against Habré-era officials mounting and under significant pressure, the Chadian government agreed not to oppose Habré's prosecution in Belgium. Senegal likewise agreed to hold Habré under arrest at his Senegal home until Belgium could properly request his extradition. That case remains open and trial is pending.²⁵

Another complaint, originally filed in November 1998 (at the same time as the Belgian complaint against Pinochet), charged Abdulaye Yerodia Ndombasi of the Democratic Republic of the Congo (DRC) with grave breaches of the Geneva Conventions and crimes against humanity. The complainants were Congolese resident in Belgium; five were Belgian citizens. They charged that, as part of the efforts of the administration of Laurent Kabila to expel an ethnically Tutsi rebel force in the eastern DRC, senior government officials, including Kabila himself, Yerodia Ndombasi and two others, had publicly called for acts of violence against the 'invaders'. Some of their incendiary speeches were captured in television recordings. Their calls were soon answered by a wave of lynching, arrests, and persecution of Tutsis throughout the DRC.

After a year's investigation and with the approval of the state prosecutor, on 11 April 2000 Judge Vandermeersch issued an arrest warrant for Yerodia Ndombasi as author or co-author of war crimes and crimes against humanity. There was only one small problem: at the time he issued the warrant (although not when the acts took place) Yerodia Ndombasi was Foreign Minister of the DRC. Judge Vandermeersch recognized the potential difficulties for a Foreign Minister trying to do his job with an Interpol warrant out for his arrest. He noted that while under the Belgian law there was no reason to preclude the ability of the courts to try the case, execution of any arrest warrant had to be stayed while the suspect was a state representative on an official visit. To do otherwise would impermissibly interfere with international

24. Court of Appeals of Dakar, 4 July 2000, affirmed Court of Cassation, 20 March 2001. The decisions, and commentary, are available in French at <http://www.hrw.org/french/themes/habre-decision.htm>; http://www.hrw.org/french/themes/habre-cour_de_cass.htm.

25. See <http://www.hrw.org/french/themes/VerwilghenLetter.jpg>.

diplomacy and tread on the rights of the state, not just the individual.²⁶ However, there was a point to issuing the warrant even if it could not be executed: it allowed the judge to compile a dossier of information about the alleged crime that would be available once the defendant no longer held a diplomatic post. Vandermeersch notified the DRC courts of the case, but (not surprisingly) they made no effort to open their own investigation.

The DRC did react, however. In October 2000 the DRC government filed its own complaint with the International Court of Justice. It accused Belgium of overstepping its authority, violating the customary law principle that a state may not exercise its authority on the territory of another state, and trampling on the rules about the immunity from prosecution of foreign ministers. It asked the court to tell Belgium to quash the arrest warrant.

The ICJ decision, handed down on 14 February 2002, ordered Belgium to rescind the arrest warrant and found for the DRC. Against the wishes of some of the judges, it did not deal with the question of whether universal jurisdiction could apply at all when the suspect was not present in the country. Instead, the decision focused on the issue of immunity, finding that incumbent foreign ministers enjoyed a functional immunity from civil or criminal proceedings in another country, whether or not the charges involved international crimes.²⁷

While the International Court of Justice declined to grapple with the issue of whether the law on universal jurisdiction included a presence requirement, the Belgian courts could not avoid it. The issue came to a head in the *Yerodia* case,²⁸ and again, more spectacularly, three months later, in the complaint against Ariel Sharon. In June 2001, 23 complainants, only one resident in Belgium, filed under the 1993/99 Belgian law an application against Ariel Sharon, Prime Minister of Israel, and Amos Yaron, Director-General of the Israeli Defence Ministry. The complaint alleged that during Israel's 1982 invasion of Lebanon Sharon, the then Defence Minister, Yaron, then the local commander of the Israeli Defence Forces, and others had committed war crimes by allowing Lebanese militiamen to murder hundreds of innocent civilians in the Sabra and Shatila camps. As evidence, they pointed to an Israeli commission of inquiry that had found Sharon 'indirectly responsible'.²⁹

The Belgian investigating magistrates recognized full well the explosive political implications of investigating Israel's head of state, but felt constrained by the requirements of Belgian criminal procedure to open an investigation file, after first getting the approval of the state prosecutor. The decision set off a minor firestorm. Sharon denounced the Belgian courts and announced that he would no longer travel to Belgium. Belgium assumed the rotating presidency of the European Union in July 2001, but the investigation of Sharon was a major obstacle to Belgium's being able

26. Tribunal of first instance of Brussels, 11 April, 2000, cited by the ICJ in *Arrest Warrant Case, (Democratic Republic of the Congo v. Belgium)*, Judgement of 14 Feb. 2002, (2003) 41 ILM 536, also at <http://www.icj-cij.org>.

27. *Arrest Warrant Case*, supra note 21. For commentary, see, e.g., L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003), 227.

28. *Arret de la Cour d'appel de Bruxelles*, Chambre de mises en accusation of Brussels, 16 April 2002.

29. The complaint is available at <http://www.indictsharon.net>. The Kahan Commission report may be found at Report of the Commission of Inquiry into the events at the refugee camps in Beirut, 8 February 1983, <http://www.israel-mfa.gov.il/mfa/go.asp?MFAoigno>.

to play a role in peace talks. Criticism mounted. The Sharon case seemed the worst possible test case: a high-profile and controversial defendant who was a current head of state, no ties to Belgium to speak of, no co-operation from the state where the defendant resided or where the crimes were committed. It was unclear whether the case could be heard in Lebanon, which had an amnesty law in place. As Israel pointed out, the Israelis *had* investigated, Sharon had lost his job, and there had been at least an implicit decision that criminal prosecution was not warranted. On the other hand, there was a good deal of evidence tying the suspects to the crimes. How could the complainants' lawyers tell their clients that their suffering and the loss of their family members was too politically sensitive to warrant trying to gain redress in any possible forum?

The Acting Attorney General of Brussels sought an interlocutory ruling on the courts' ability to proceed. Given the recent ICJ ruling in the *Yerodia* case, the easiest solution for the Belgian Court of Appeal seemed to be to quash the warrant on immunity grounds. Human rights lawyers worried that the court would go further and overturn the universal jurisdiction law altogether. In the end, the court did neither. In a 26 June 2002 decision, the court first reaffirmed that a law establishing Belgian jurisdiction over international crimes committed outside Belgium by non-Belgians was not *per se* invalid.³⁰ However, the courts could only exercise jurisdiction if the defendant was already present in Belgium.

The court found a presence requirement in an 1878 criminal procedure code (in Article 12, to be exact) which, with modifications, was still in effect. In passing the 1993 and then the 1999 law, the Belgian legislature was presumed to know about the provisions of the criminal procedure code, and if they had at the time chosen not to change those provisions explicitly, it had to be because they intended the universal jurisdiction law only to apply when the defendant was in Belgium. Nothing in the legislative history of the Belgian law, the court found, was to the contrary; a proposed 2001 change in the law had not yet taken effect. Nor did any of Belgium's treaty commitments require action when the defendant was not found in Belgium; indeed, the treaties indicated a preference for domestic prosecutions, leaving extraterritorial jurisdiction for cases where the defendant had not been found at home. Ariel Sharon, presumably, like *Yerodia*, was not present in Belgium. In that case, the court found, the case could not be heard and should be dismissed. The Court of Cassation in February 2003 in part reversed this ruling.³¹ It confirmed the dismissal against Sharon himself, this time on immunity grounds. However, it allowed the case against other defendants, including Amos Yaron, to go forward, without requiring the defendants' presence.

Under political pressure from all sides, the Belgian legislature began debating how to amend the law to keep it essentially intact while avoiding potential excesses. At first, the discussion focused on the relationship with the ICC, and on possibly requiring greater ties between Belgium and the complainants – the Spanish solution.

30. *Sharon and others*, 10th Chamber, Appeals Court of Brussels, 26 June 2002, available at <http://sabra-shatila.be/documents/arresto20626.pdf>.

31. Belgian Court of Cassation, 12 Feb. 2003, available at <http://indictsharon.net>.

In April 2003 the legislature passed a group of modest amendments aimed at streamlining and clarifying the law.

The question of whether a defendant needs to be present within the jurisdiction of the court, and at what stage, goes to the heart of what universal jurisdiction is about. Can a court investigate, issue a warrant, request the extradition of the defendant, and satisfy the presence requirement through extradition? At what point in that sequence does the defendant have to be there? Or is presence acting merely as a proxy for ties to the forum?

If the defendant has to be present for the judicial process to begin, it will be difficult ever to get to the arrest stage, since former dictators and torturers are unlikely to linger somewhere long enough for a conscientious judge to put a dossier together, at least once they get wind of an investigation. Universal jurisdiction under that scenario will still play a constructive role, but its function will be to ensure that dictators stay at home and that there is 'no safe haven' for such people, not to see that they are actually brought to justice. Nor can courts put together the evidence and testimony that might jump-start a domestic prosecution if the 'investigate and extradite' route is closed. Under a 'presence of the defendant' rule, the *Pinochet* case would never have happened. British human rights groups had tried four times to start a prosecution against him on various of his visits to the United Kingdom, but each time he had left before the slow machinery of the justice system (and the requisite political will) could be brought to bear. Without the Spanish extradition request, it would have been much more difficult to kick-start that machinery into operation.

The *Sharon* case raised the profile of Belgium's universal jurisdiction law and its potential for discomfiting the powerful. More high-profile cases appeared. In the context of the US build-up to war in Iraq and fierce European opposition to it, a group of Iraqis in March 2003 sued former president George H. W. Bush, Vice President Dick Cheney, Secretary of State Colin Powell, and retired general Norman Schwarzkopf for bombing an air raid shelter in Baghdad over a decade before.³² In May, another Iraq-related complaint accused General Tommy Franks and other US officials of war crimes committed during the 2003 invasion of Iraq.³³

Reform of the law, under way since April, now became politically urgent. US Defence Secretary Donald Rumsfeld blustered that he would oppose building expansion and might even pull NATO headquarters out of Brussels. Anti-universal jurisdiction laws modelled on the anti-ICC law were introduced in the US Congress. Belgium's recently elected coalition government tried vainly to resist the pressure, but quickly gave in and proposed a package of modifications that left the law far less sweeping – and far less useful.³⁴ The modified law gives immunity to heads of state, heads of government, and foreign affairs ministers. It tightens the required contacts with the forum state, allowing the Belgian courts to hear complaints only when the suspect is Belgian or lives in Belgium, the complainants are Belgian or have lived

32. 'Plainte pour crime de guerre contre Bush père', *Le Soir en Ligne*, 18 March 2003.

33. The complaint is available at <http://www.stopusa.be/1Campagne/proces-Franks/PROCES-Complaint-Against-Tommy-Franks.htm>

34. Loi relative des violations graves du droit international humanitaire, 5 Aug. 2003, *Moniteur Belge*, 7 Aug. 2003, 20506.

there legally for three years at the time of the alleged crimes, or if a treaty requires Belgium to exercise jurisdiction. In addition, it removes the ability of the victim to initiate proceedings that made the Belgian forum particularly accessible. The decision to proceed now rests entirely with the state prosecutor: the investigating magistrate cannot act based solely on a *partie civile*-initiated complaint. Finally, and most problematically, the prosecutor must reject a complaint if, under the concrete facts, the case should be heard by a court with international jurisdiction or in the place where the crimes were committed or where the suspects are found, so long as the alternative jurisdiction is independent and impartial. Thus the Belgian law takes up the Spanish idea that universal jurisdiction is merely subsidiary to that of the territorial courts, but does so in a way that leaves much more discretion to the state prosecutor. The Belgian solution combines the problematic elements of defining properly the relationship of the territorial and extraterritorial courts with those of having executive branch rather than judicial officers choosing whether to go forward. The result is a high degree of ill-defined discretion left to officials susceptible to political pressures.

3. CONCLUSIONS

Along a number of different axes, the law has been reduced and tightened up. Both judges and legislators seem to be reacting to a sense that universal jurisdiction without specified limits is too unbounded, too subject to confusion, when more than one jurisdiction can prosecute the same course of conduct. Faced with the theoretical possibility of multiple prosecutions for the same course of action, in an effort to create an orderly process of prioritization Spain and Belgium, through different means, have in effect superimposed a nationality tie (or at least something close to it) on something they are still calling universal jurisdiction. But presumably the reason universal jurisdiction exists at all is because the crimes involved are of concern to all states. By their very definition and nature, they transcend the realm of territorial sovereignty. If so, why should any additional tie be a jurisdictional prerequisite? Practical concerns over the ability to extradite, to obtain witnesses or information, or otherwise to try the case may require prosecutors and judges to exercise a prudential course of restraint where there are no ties to the forum, but that is very different from a bright-line jurisdictional rule. The difference between the 'rule of reason' of the Spanish Supreme Court dissenters, and the jurisdictional prerequisite of the majority and of the Belgian legislator, is the difference between limited universal jurisdiction and a jurisdiction that is universal in name only.

The easiest explanation for these setbacks is political pressure, especially from the United States. It is doubtful whether the cases against US officials would have ever moved beyond a preliminary stage. Rather, the threat to the United States came from the validation of the idea of international justice, the right of courts outside the United States to investigate certain alleged international crimes if committed by US nationals, even without the consent of the United States. Thus the furious reaction to the *Franks* suit was more about the US campaign against the ICC than the merits of the charges. Similarly, the conservative Aznar government in Spain never supported the universal jurisdiction cases, and its pro-US

tilt in 2003 simply accentuated that antipathy. Spanish judges could not fail to notice.

This is, however, a partial truth. It is also true that by targeting highly visible current heads of state, by aiming at the leaders of powerful, unpopular countries such as the United States and Israel, and by simultaneously bringing dozens of cases without first creating an adequate jurisprudential base, activists and lawyers overloaded a new, controversial, and fragile process. A more prudent approach would have built up a jurisprudence from the bottom, starting with cases with clear ties to the forum state and with less explosive political baggage. These cases would have taken time to build a constituency in both the forum and territorial states adequate to withstand the inevitable political pressures. They would have been chosen, not just with an eye to the political and publicity effect, but for the real possibilities for unblocking or catalyzing debate and eventual court action. Building on precedent may be a concept more familiar to common-law lawyers than to civil lawyers. Nonetheless, while the legal principles may differ, the political considerations are similar.

I am not here complaining about ‘politicization’ of the process. Most human endeavour is marked by multiple agendas and interests, and these cases were no different. But a strategic, co-ordinated approach to building a law viable in the long-term fight against impunity seems to have been missing, perhaps inevitably so given the decentralized, opportunistic nature of these cases. The result is an at least temporary retreat from the promise of global justice.

Does this mean that universal jurisdiction, once touted as a harbinger of a more just international legal order, is useless? Far from it. But I suggest that its utility does not come solely, or even mainly, from the ability to capture dictators and torturers. Nor does it come from the possible deterrence value, either on atrocities or, more modestly, on post-atrocity travel by perpetrators. These effects would be difficult to measure in any case. Rather, the primary value lies in the ability of a transnational investigation based on universal jurisdiction to prompt investigations and prosecutions at home, in the territorial state. Some cases did this: the *Pinochet* litigation undoubtedly changed for ever Chile’s domestic political and legal landscape. The investigations into Argentine military atrocities prompted new investigations, judicial and legislative annulments of the amnesty law, and a new willingness to extradite human rights offenders if they are not tried domestically. The Habré case seems to have had similar catalytic effects in Chad. The story of how and why these cases produced such effects is beyond the scope of this article.³⁵

These cases all had close links to the forum state, so that reforms simply requiring a showing of such links would not have changed them. Other reforms, especially those vesting discretion in the executive branch to decide when a case may be appropriately transferred to the territorial state, might well have proved fatal. As we move forward, advocates would do well to measure potential cases against the goal of jump-starting domestic processes, even as they inevitably assay strategies to overcome this most recent series of limitations.

35. See N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2004), which elaborates on many of the ideas in this article.

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